FILED

No. 96 596 OCT 15 1996

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1996

CRESCENCIO CISNEROS,

Petitioner,

against

JANET RENO, Attorney General, U.S.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

CRESCENCIO CISNEROS
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Questions Presented

Whether Article IV; Section 4; of the Constitution is applicable to maintain standing by a natural born citizen of the United States. When it is published in a court record, that he participated as a witness to maintain due process at an institute of government. When he was denied the right to participate as a lawful witness; and a false accounting tailored to obviate the situs where acts committed led to a homicide. In order to maintain an unlawful conspiracy under color of law.

Whether in New York State where there is a Republican form of government; court records can be fraudulently altered to insert testimony which never occurred. In a homicide case where the evidence of documentation in the petitioner's petition supports the allegation a jury never deliberated to return a verdict in order to obstruct justice and due process.

Whether living conspirators who took part in this farce, can continue to serve as New York State justices at an institute of government. At liberty to duplicate a similar corrupt conspiracy, adverse to the protection of a textured enumerated provision of the Constitution: Article IV; Section 4.

Whether the oppressive conduct at an institute of state government adverse to the Constitution, must be investigated by the government established by the people of the United States to serve the will of the people for a Republican form of government.

Whether the Attorney General of the United States is the appropriate person to fulfill an investigation and prosecution of individuals who have used the power to effectuate oppressive conduct on citizens of the United States; which can be identified

as the oppressive use of political power that deprives the people of the United States to the reasonable conscience of a self governing people at a court of law.

Whether non-feasance by the Attorney General of the United States in effect, sustains conduct adverse to the "guarantee" of Article IV, Section 4; of the Constitution. And the issuance of mandamus on the Attorney General of the United States, to fulfill an obligation to the Constitution, within the purview of her office is the appropriate remedy.

Parties

The Parties to the proceeding are:

1. Crescencio Cisneros, Petitioner.

2. Janet Reno, Attorney General, United States, Respondent.

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No.

IN THE

Supreme Court of the United States

October Term, 1996

CRESCENCIO CISNEROS,

Petitioner,

against

JANET RENO, Attorney General, U.S.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Crescencio Cisneros, respectfully requests that a Writ of Certiorari to be issued to review the opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 14, 1995.

Summary of the Case

Petitioner's father is a homicide victim at a municipal hospital where the autopsy indicates a homicide and is designated as BX. 1016/72.

Petitioner who was a lawful witness of an assault on his father never testified. However, there is a falsely altered record at the Supreme Court of New York in Bronx County which is designated as BX. 1060/72. Among the false facts published, that petitioner was given the opportunity to testify. The "trial" designated as BX. 1060/72 never took place as published.

As the indexed documentation and altered BX. 1060/72 evince a jury did not deliberate to a verdict. The presiding court justice at the original "trial" was among the co-conspirators where there was fraud in the inception and a continuing deception to defraud petitioner's mentally ill brother of his liberty under color of law. Another court record designated BX 1016/72 is expunged and BX. 1060/72 is the "case" which is created to obviate the situs where a homicide took place.

There is a reversal of judgment on appeal. The illegal activity continues and petitioner's brother's unlawful incarceration is covered up.

Petitioner's brother who is still mentally ill is being treated as an out-patient, as a patient whose record reflects the decision published in BX. 1060/72 by State Mental Health hospitals in New York State.

REASONS FOR GRANTING THE WRIT

The institutes of government belong to the People of the United States, and cannot be used against them. As this petition clearly reveals; one of the living persons who participated in a sham where there was no verdict sheet and no deliberation by a jury, and the prevention of testimony to effect due process, continues to administer justice as a chief Administrative Judge in an American court of law.

When an American citizen complains to the proper government authority, which is the Department of Justice. The federal government does not have to investigate an act which is diametrically opposed to Article IV; Section 4; of the Constitution. The citizen brings his petition to the Supreme Court for judicial review as the Constitution is the law of the land, and cannot be dismissed when applicable by the Attorney General of the United States.

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated: October 10, 1996

Respectfully submitted,

Crescencio Cisneros
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(718) 881-1177

APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit Granting Motion for Summary Affirmance

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

95-CV-8205
Patterson, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventeenth day of July, one thousand nine hundred and ninety-six,

----------X

CRESCENCIO CISNEROS,

Petitioner-Appellant,

96-6107

v.

JANET RENO, United States Attorney General,

Respondent-Appellee.

----------X

United States Court of Appeals
Filed
Jul 17, 1996
George Lange III, Clerk
Second Circuit

The Government having moved for summary affirmance of the district court judgment, upon consideration thereof, it is ordered

that said motion be and it hereby is granted and the appeal is dismissed. The appellant lacks standing to demand that the Government investigate and prosecute other individuals. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1972).

s/sig
Jon O. Newman

s/sig
Ralph K. Winter

s/sig
Roger J. Miner

s/sig
George Lange III

JON RKW RJM
Issued as Mandate: July 17, 1996

APPENDIX B—Opinion of the United States Court of Appeals for the Second Circuit Denying Petition for a Writ of Mandamus

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Supreme Court Bronx County

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of September, one thousand nine hundred and ninety-five,

----------X

In Re: CRESCENCIO CISNEROS,

95-3067

Petitioner.

----------X

United States Court of Appeals
Filed
Sep 14, 1995
George Lange III, Clerk
Second Circuit

A petition having been brought herein by petitioner *pro se* for a writ of mandamus, upon consideration thereof, it is ordered that said petition be and it hereby is denied. *See* U.S.C. § 1361 (district courts have original jurisdiction of any action in the

nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff).

A TRUE COPY
GEORGE LANGE III, CLERK
s/George Lange III

s/sig
Jon O. Newman

s/sig
Ellsworth A. VanGraafeiland

s/sig
Fred I. Parker

JON EVG FIP
Sep 14, 1995
Issued as Mandate: 9/14/95

APPENDIX C—Opinion and Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CRESCENCIO CISNEROS,

95 Civ. 8205 (RPP)

OPINION AND ORDER

Petitioner,

-v-

JANET RENO,
Attorney General of the United States,

Defendant.

----------X

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendant, Janet Reno, Attorney General of the United States moves to dismiss complaint of petitioner, Crescencio Cisneros ("Cisneros"), pursuant to Rules 12(b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure. For the following reasons, defendant's motion is granted.

BACKGROUND

Cisneros filed this action on September 26, 1995, seeking a writ of mandamus pursuant to 28 U.S.C. §1361. Cisneros seeks to compel Attorney General, Janet Reno, to investigate the circumstances surrounding the death of petitioner's father and the trial of his brother, Ralph Cisneros.

Petitioner's father died in March 1972. (Petitioner's Submissions. ("Pet.") p. 40.) In December, 1994, Ralph Cisneros was convicted of manslaughter in the first degree for the death of his father. On June 16, 1975, Ralph Cisneros was sentenced to State prison for a maximum of nine years. (Pet. p. 64) Petitioner's brother has apparently completed his term of incarceration and is not a party in petitioner's action.

Petitioner alleges that he witnessed an hospital employee assault his father on the night his father died (Pet. p. 5), but was not permitted to testify about this event at his brother's trial (Pet. pp. 15-17). Petitioner contends that a false version of his testimony was published in an altered transcript of the trial. (Petitioner's Affirmation in Opposition to Government's Motion to Dismiss ("Pet. Oppn.") p. 1.)

Petitioner points out alleged discrepancies in the information regarding the date and time of his father's death which was included in a death certificate completed by the medical examiner and an autopsy report completed by a physician at Morrisania Hospital in the Bronx. (Pet. pp. 5-6). Petitioner portrays these discrepancies as examples of the work of a criminal conspiracy which included judicial officers of New York and the staff of the New York Medical Examiner's office and sought to obstruct justice in his brother's case. (*See e.g.* Pet. pp. 1, 5-7, 18-22.)

Petitioner's exhibits indicate that he has requested and been denied the assistance of the Office of the District Attorney for the Bronx, the Criminal Investigations Divisions for the Attorney General of New York, and the Office of the United States Attorney for the Southern District of New York. (Pet. p. 66.)

DISCUSSION

In accordance with the separation of powers, U.S. Const. art. III, §2, the judiciary will only issue writs of mandamus in limited circumstances. As the Supreme Court has cautioned "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Mandamus jurisdiction arises only where (1) the plaintiff has a clear right to the relief sought; (2) the defendant has a plainly defined and peremptory duty to perform the act in question; and (3) no other adequate remedy is available. *Anderson v. Bowen*, 881 F.2d 1, 5 (2d Cir. 1989) (citations omitted).

Petitioner's papers do not establish an existing duty to petitioner to initiate the investigation sought. A private citizen, like petitioner, "lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Such matters are within the discretion of the prosecutorial authority. *Otero v. United States Attorney General*, 832 F.2d 141 (11th Cir. 1987); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). *See also Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Furthermore, the judiciary is only permitted to determine actual cases and controversies, U.S. Const. Art. III, §2, and the doctrine of standing is a means of implementing this requirement. *In re Appointment of Independent Counsel, Schiavone v. U.S.*, 766 F.2d 70, 72 (2d Cir. 1985) (plaintiffs seeking the appointment of independent counsel to investigate whether government informant had given false evidence before a grand jury lacked standing because their injury was not traceable to government's failure to prosecute informant); *see also Allen v.*

Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

In order to demonstrate that a plaintiff has standing, he must establish that: (1) he has suffered a "distinct and palpable injury," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608, 60 L.Ed.2d 66 (1979) (citations omitted); (2) the injury "fairly can be traced back to the challenged action," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S. Ct. 1917, 1925, 48 L.Ed.2d. 450 (1976); and (3) it is likely that a favorable court decision would redress plaintiff's injury, *Valley Forge v. Americans United*, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982).

Petitioner alleges injuries to his brother and his father and contends that he was injured when he was denied the right to testify. Petitioner has not shown, however, that this injury can be traced to the present refusal of the Attorney General to investigate petitioner's allegations. Nor has petitioner shown that an order compelling an investigation would redress the injury about which he complains. Thus, plaintiff has failed to meet the threshold requirement of demonstrating standing.

CONCLUSION

The petitioner has not shown that mandamus jurisdiction exits or that he has standing. Therefore, this Court lacks subject matter jurisdiction over petitioner's claims and defendant's motion to dismiss is granted pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: New York, New York
January 17, 1996

s/Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

Copies of this Opinion and Order sent to:

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FILED OPINION
U.S. DISTRICT COURT
1996 JAN 19 A 9:34
SOUTHERN DISTRICT
OF NEW YORK

No.

Supreme Court, U.S.
FILED

In The 96 596 NOV 15 1996

OFFICE OF THE CLERK

Supreme Court of The United States

October Term, 1996

LIVING SPRINGS RETREAT, A Religious Corporation,

Petitioner,

v.

COUNTY OF PUTNAM; TOWN OF PUTNAM VALLEY; RONALD FIORENTINO; PHILIP W. ORLANDO; and RUTH A. CLAUSE, individually and as Assessors of the Town of Putnam Valley; MAHOPAC CENTRAL SCHOOL DISTRICT OF THE TOWNS OF CARMEL AND PUTNAM VALLEY; and PUTNAM VALLEY FIRE PROTECTION DISTRICT,

Respondents.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division: Second Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY SHUMEJDA
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23pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether non-compliance with a state statute of limitations is a sufficient and independent state ground which bars further review?

2. Where Courts applied reasonable guidelines to determine whether operations of business advanced substantial non-exempt purpose and did not inquire into merits of particular religious doctrine, did Court violate First and Fourteenth Amendments rights of religious organization which sought tax exempt status?

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FACTUAL STATEMENT

The issues presented before the Courts below were threefold: (1) Whether the actions were barred by the four-month statute of limitations? (2) Whether the real property of petitioner was used exclusively or "primarily" for religious purposes which is one of the standards under Section 420-a of the New York Real Property Tax Law for tax exemption? (The other standards were met by the petitioner and were not in dispute); and (3) Whether the respondent tax assessors had unconstitutionally discriminated against petitioner by granting tax exemptions to other groups or entities?

A. NEW YORK REAL PROPERTY TAX LAW SECTION 420-a.

In order to be entitled to a tax exemption under Section 420-a, a religious organization must meet the following three part test:

(1) the group must be organized or conducted exclusively for religious purposes (2) the property must be used exclusively (primarily) in furtherance of that purpose and (3) no pecuniary benefit may inure to the benefit of any of its officers, members or employees, nor may it be used as a guide for profit making operations. Parts (1) and (3) are not in issue in this case. The only issue is whether the petitioner's real property was used primarily for religious purposes.

B. THE STATUTE OF LIMITATIONS ISSUE.

The first action in this consolidated case relates to the assessment rolls for 1980 through 1984. The rolls in each year were final on July 1st, and therefore Court review of the Board of Assessors' determination can be had after said

date. The petitioner served his complaint on the Town on June 23, 1988. Thus more than eight years expired since the roll became final in 1980; seven years since the roll became final in 1981; six years since the roll became final in 1982; five years since the roll became final in 1983; and four years since the roll became final in 1994. The second complaint relates to assessment rolls for the years 1985 and 1986, and was served on October 10, 1989. The petitioner argues that the six year statute of limitations is applicable. Even assuming arguendo that the petitioner is correct, the years 1980, 1981 and 1982 are beyond the six year statute of limitations. However, the respondents claim that a four (4) month statute of limitations has been held applicable to these kind of cases by New York's highest court, the Court of Appeals. All of the years at issue would then be time-barred.

C. THE LIVING SPRINGS RETREAT PROPERTY.

The subject property consists of between 38 to 40 acres of land with various buildings and improvements. The primary buildings on the property consist of a large reconditioning center or health spa, and a number of one-family dwellings and cottages which have been renovated and in which live approximately nine (9) families and other permanent volunteers or staff. (A-803)[1]. There are other buildings which house an office, woodworking shed, commissary, heating plant and other miscellaneous uses. (A-803). There is also a church on the property. However, the church and the land upon which it sits (approximately 1 acre), was granted a full exemption and therefore it is not an issue in this case. Together these buildings and the land fronting on Bryant Pond are called Living Springs Retreat.

---

[1] References are to the Joint Appendix filed in the Appellate Division containing the Record below.

Living Springs Retreat is a self-described lifestyle center operated by law members of the Seventh Day Adventist Church, who are living a communal type existence. The lay members devote themselves to following the tenets and lifestyle of the Seventh Day Adventist Church, but it must be noted that the said church is not the owner of the property; has no control over the activities conducted on the property; and is not involved in any way with daily supervision. (A-706). No ordained minister of the Church resides on the property or supervises the programs. (A-709).

There are two types of persons who use the property, i.e., "staff or volunteers" and "guests". The "staff or volunteers" consist of the lay members of the Seventh Day Adventist Church who reside in the one-family dwellings and cottages on the property. (A-721). They conduct the conditioning and health related programs, grow the farm products, and operate the vegetarian restaurant and food store owned by the petitioner in New York City. (A-729). The "guests" are members of the general public who attend the health related programs at the reconditioning center. (A-717, A-718). They may or may not be members of the Seventh-Day Adventist Church. (A-718). In fact, most ar not members. (A-735). They do not attend these programs for religious purposes, but rather for improvement of their health and fitness. The types of programs they attend are non-smoking clinics; stress management programs; heart disease prevention; weight management; and nutrition and cooking classes. (SA-31 - 34). The "guests" attend these programs as a result of newspaper advertisements and brochures which are paid for by the petitioner. (A-1092). For example, on July 25, 1982, the petitioner advertised in the "Small Inns & Lodges" section of the Sunday New York Times as follows: "BREAK AWAY". ARE YOU DRAGGING OR ARE YOU ALIVE? Living Springs Retreat in a country setting with vegetarian meals, exercise, boating, saunas, health lectures

for weight control, heart conditioning, smoking plan, stress, general conditioning. Special 2 day package for $ 99, 1 week for $ 360. Call 914-526-2800" (A-1092). There is no mention of any sort of religious activities in these advertisements. Similarly the brochures sent to potential "guests" describe the programs, facilities and activities in great detail, but not once is religion mentioned. There is no requirement that the guest even state what religion he or she is a member of in the application forms. The fees paid by the "guests" run from $ 360 per week to approximately $ 460 per week in the later years under review. (A-701).

The "guests" stay in the building known as the reconditioning center, which contains bedrooms, a dining room and exercise room, whirlpools, saunas, and a Russian steam room. (A-719 - 720). They do not attend the morning devotions, which are attended by staff only. (A-737 - 738). While the days activities are started out with a prayer, and the staff offers to pray with the "guests", the "guests" are not required to pray. (A-412 - 413). The "guests" are not required to participate in any religious activities, although they are invited to attend Friday evening and Sabbath devotions in the church. (A-739). Appellants claimed during the trial that the activities and lectures were intertwined with the religion, such as to point out the wonders of God's creation. However, when petitioner's witness Harold James Lance, President of Outpost Centers, Inc. testified, he made it clear that the basic tenets of the Seventh-Day Adventist Religion would be touched upon only in a very limited or casual way. (A-276). He further stated- "I would feel that any kind of doctrinal recitation of the particular beliefs of the Seventh-Day Adventist Church would not be given and would be inappropriate". (A-276,277). In fact, the program is such that it would not be offensive to any religious faith, such as Jewish, Catholic or Protestant. (A-413). It bears emphasis, that the petitioner's programs could have been

expressly advertised as religious, and could have been taught as Seventh-Day Adventist lectures, but they were not. It is obvious that the petitioners wanted to compete with the other health retreats or spas, and would have difficulty obtaining paying "guests" if it were presented as a religious program.

The program at the reconditioning center is a commercial enterprise open to the general public. It is very similar to the program offered by the Pawling Health Manor, a commercial enterprise. (A-1093). The Pawling Health Manor is a health retreat or spa which presents health lectures; has daily sessions in meditation and relaxing; vegetarian food demonstrations; non-smoking; weight reduction; and other activities. (A-1093). Neal Clayton Wilson, senior statesman for the Seventh-Day Adventist Church, agreed that the activities are certainly similar to those advertised by petitioner. (A-125).

The reconditioning center program, when considered by itself, including all the expenses attributable to it, makes a profit. For example, for the year ending June 30, 1986, the Treasurer of the petitioner prepared worksheets showing such an allocation between the reconditioning center and the balance of the property. The total expenses allocable to the reconditioning center are $ 91,133. The total income from the center was $108,892, leaving a profit of $ 17,759. This is using the Treasurer's own allocations, except for depreciation and taxes. The same exercise can be done for each of the years at issue and a profit would be shown, if considering the reconditioning center alone.

Another aspect of this case relates to the remaining use of the subject property. Heather Erho, Treasurer of the petitioner testified that approximately one-third to one-half of the staff or volunteers work in the reconditioning center. (A-211). The remaining staff or volunteers work in the

restaurant or health food store operated by Living Springs Retreat in New York City. (A-211). This restaurant is vegetarian, which serves approximately three hundred customers a day for breakfast and lunch. (A-730). In fact, the restaurant now serves dinner and requires two shifts of workers. (A-733). The store is a health food store open to the general public. The building in New York City is not exempt from real estate taxes. If would be very difficult to claim that this commercial enterprise is generically religious. Yet the plaintiff is asking the Town of Putnam Valley to exempt the homes in which these same workers reside from the payment of taxes. The use of these homes is not religious in nature. It is no different from any other communal type sharing arrangement.

It is the commercial nature of the vegetarian restaurant, health food store and the program at the reconditioning center that separates them from religious activities. Any spiritual or religious evangelism is clearly incidental to the commercial enterprises. The fact that they are operated by religious lay people and are consistent with Seventh-Day Adventist principles does not change their nature.

D. THE TRIAL COURT DECISION.

The trial of this matter was heard before Hon. William A. Zeck, Judicial Hearing Officer of the New York Supreme Court.

Judge Zeck held that the issue relating to this action being time barred by the four months statute of limitations, had already been determined by Judge Dickinson on December 5, 1989, citing *Niagara Mohawk v. Troy School District*, 59 N.Y.2d 262 (1983). This was an action for monies had and received, claiming that the taxing authority

had exceeded its constitutional spending limit. Judge Zeck ruled that Judge Dickinson's decision was the law of the case. However, Judge Zeck ignored a decision which was rendered by the Court of Appeals subsequent to Judge Dickinson's decision and which was squarely on point. The case is *Kahal Bnei v. Fallsburgh*, 78 N.Y.2d 194 (1991). In said case, Court distinguished the situations applicable to *Niagara Mohawk* from cases such as the case at bar, and held that the four month statute of limitations applied.

The remaining issue determined by Judge Zeck was whether the petitioner was entitled to a religious tax exemption under Real Property Tax Law Section 420-a. The issue in this case relates to the requirement that the property must be used exclusively or primarily in furtherance of religious purposes. In this regard, Judge Zeck held as follows:

> "Based upon the lack of participation of guests in Adventist religious matters, the absence of doctrinal instruction or study in the Seventh Day Adventist faith, and the focus on health improvement in plaintiff's own brochures distributed to prospective guests who pay a fee for these health-related services, the Court is constrained to find that the use of the property as a reconditioning center is primarily for health and fitness purposes rather than religious purposes. As to use of residences by staff workers and for workers in the New York City vegetarian restaurant and health food store, such use if primarily residential with respect to this property and not a use incidental to a religious use of the property."

Judge Zeck further stated as follows:

> "The distinguishing feature of the cases where exemptions were granted is that the primary use of the facility involved adherents on retreat or those involved in the study of religious principles of the faith. Advertising to the general public was found to be relevant factor in the case of *The Shrine of Our Lady v. Auriesville*, *supra*, and in *Greater New York Corp. of Seventh Day Adventists v. Dover*, *supra*. In this case there is no proof that guests attend for religious reasons, for religious education or study of the Seventh Day Adventist faith, or for any reason other than the improvement of their health and fitness."

Finally, the Court held that Petitioner's claim of unequal treatment and discrimination was not supported by the evidence.

Accordingly, judgment was granted dismissing the complaint.

E. THE APPELLATE DIVISION DECISION.

At the outset, the Appellate Division dismissed the respondents' cross-appeal relating to the statute of limitations on the ground that the respondents are not aggrieved thereby, having won in the Court below on other grounds.

Referring to the lifestyle/health maintenance facility, they noted as follows:

> "...At this facility, which is opened to the general public and is attended primarily by individuals who are not members of the

> Seventh-Day Adventist religion, there are whirlpool and sauna treatments, stop-smoking programs, video programs and slide shows on health related topics, outdoor activities, classes in cooking, and other health related activities. Guests are not required to attend or take part in any traditionally overt religious activities, such as prayer groups or services. The plaintiff's advertising for the camp does not indicate that the program is religious in nature or related to the Seventh-Day Adventist Faith" [2]. 4a.

The Appellate Division also held that the Supreme Court correctly held that the property in question is not used primarily for petitioner's religious purposes. 4a.

The Court also stated that

> "...Although health and physical well being are central concerns of the Seventh Day Adventist religion, in this case the health related services are directed by the plaintiff to nonadherents of its religious principles. The fact that advertising for those services is aimed at the public as a whole supports the conclusion that the camp is not used primarily for the plaintiff's religious purposes...(citing cases)". 5a.

The Appellate Division stated further in support of its

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[2] Reference is to Appendix to Petition For Writ of Certiorari.

position that:

> "...Also significant is the fact that guests are not required to participate in any prayer services, indoctrination, or similar activities..." 5a.

Finally, the Appellate Division found that the petitioner offered no evidence that the Town granted tax-exempt status to other properties used in a similar manner to the property in question and the claim of discrimination was rejected. 5a.

REASONS FOR DENYING THE WRIT

It has been long held that imposition of taxes on real property owned by religious and charitable organizations does not violate the free exercise and establishment clauses of the First Amendment. *Gibbons v. District of Columbia*, (1886) 116 U.S. 404.

Far from applying subjective discretion as petitioner suggests, the State of New York has statutory guidelines which must be applied in order to determine which an applicant is entitled to a tax exemption. In this case, the petitioner failed to comply with the "primary use" test. Respondents did not delve into, or examine, or pass upon, the creed and theology of the Seventh Day Adventist Church. They merely made a factual determination that the primary use of the property was not a religious use.

I. NON-COMPLIANCE WITH A STATE STATUTE OF LIMITATIONS IS A SUFFICIENT AND INDEPENDENT STATE GROUND WHICH BARS FURTHER REVIEW.

It is the duty of this Court to ascertain whether a nonfederal ground of decision independently and adequately supports a judgment so as to preclude Supreme Court review. Noncompliance with a state statute of limitations is a sufficient and independent state ground which bars further review. This is true even if not discussed in the opinion. Such an issue can bar review if it appears that it offers an independent and adequate ground for decision. *Johnson v. Risk*, (1890), 137 U.S. 300; *Paschall v. Christie-Stewart, Inc.*, (1973), 414 U.S. 100, *reh den* 414 U.S. 1138, and conformed to (Okla.) 544 P2d 505, *Cert. den* 426 U.S. 935.

It is the respondents' position that the four (4) month statute of limitations applies to these cases. The petitioner contends that a six (6) year statute of limitations applies. Even if the petitioner's argument were correct, the years 1980, 1981 and 1982 must be dismissed as they were not brought within six years from the time that the assessments in said years became final. In any event, the New York Court of Appeals, in a case directly on point, *Kahal Bnei v. Fallsburg*, (1991) 78 N.Y.2d 194, *mot. for reargument den.* 78 N.Y.2d 1008, held that a four (4) month statute of limitations applies. In *Kahal*, the plaintiff brought a declaratory judgment action seeking a declaration that its property is used for religious purposes and is entitled to an exemption under Section 420-a of the Real Property Tax Law, the same relief as the case at bar. The Court held as follows:

> "However, where the challenge is that the taxing authority has exceeded its power, a plenary action may be brought collaterally attacking the assessment. The procedures of article 7 need not be followed because the assessment is void (*Niagara Mohawk Power Corp. v. City School Dist.*, 59 N.Y.2d 262, 269, *supra*). In *Hewlett Assocs. v. City of New York*, 57 N.Y.2d 356, 363, we observed that

'[i]t is well recognized that where a challenge is made to the taxing authority's jurisdiction over the subject property, the settled rule that reviews of a tax assessment may be obtained only by way of the statutory certiorari procedure is not applicable'. We noted in *Dun & Bradstreet v. City of New York*, 276 N.Y. 198,206, supra., that '[i]f taxing officers act without jurisdiction, their acts are illegal and void. In such a case, certiorari is not an adequate remedy event if a proper one'".

The "void" assessment may be challenged in an article 78 proceeding or in declaratory judgment action (see, *Matter of Watchtower Bible & Tract Socy. v. Lewisohn*, 35 N.Y. 2d 92 [improper withdrawal of prior exemption]; *Troy Towers Redevelopment Co. v. City of Troy*, 51 AD2d 173, *aff'd on opn below*, 41 N.Y. 2d 816; *Lee and LeForestier*, Review and Reduction of Real Property Assessments in New York Sect. 10.09 [2d ed.]). *Kahal's* argument that such a declaratory judgment action is governed either by those cases which hold that an equity action to "clear a cloud on title" may be brought at any time or by the "catch-all" six year limitation of CPLR 213 (1) is without merit. In *Solnick v. Whalen*, 49 N.Y.2d 224, 229, we noted that six-year limitation does not 'automatically or necessarily govern all such actions'. Rather we pointed out that is an examination of the substance of the relationship out of which the claim arises "reveals that the rights of the parties sought to be stabilized in an action for declaratory relief

> are, or have been open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action." (*Id.*, at 229-230; see also *Press v. County of Monroe*, 50 N.Y.2d 695).
>
> It is not disputed that a challenge to a "void" assessment may properly be sought in an article 78 proceeding, a form of proceeding for which a specific limitation period is statutorily provided. Thus *Kahal's* challenge to the 1987 assessment, to have been timely, must have been brought within four months from the time that the 1987 assessment became final as required by CPLR Article 78."

Since the petitioner in this action could have obtained relief to review the denial of the exemption by the Assessors in an Article 78 proceeding, the four month statute of limitations is applicable.

Judge Dickinson determined on December 5, 1989 in denying a motion to dismiss, that the four month statute of limitations did not apply. The *Kahal* case was decided by the Court of Appeals in 1991. The trial judge followed the Dickinson decision as the law of the case. The subsequent Court of Appeals decision should have been applied by the Trial Court. The Appellate Division did not address this issue, dismissing the respondents' cross-appeal relating thereto on the ground that respondents were not aggrieved by the trial court's decision. The Court of Appeals did not give reasons for its denial of leave to appeal.

II. THE COURTS BELOW APPLIED REASONABLE GUIDELINES TO DETERMINE THAT PETITIONER FAILED TO MEET THE "PRIMARY USE" PRONG OF NEW YORK'S TRIPARTITE TEST FOR TAX EXEMPTION WHICH DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The issues presented to the Court were as follows: (a) Was the "reconditioning center" or health spa used primarily for religious purposes?; and (b) Were the homes and cottages which house the workers for both the "reconditioning center" and the food store and restaurant in New York City, being used primarily for religious purposes?

In *Living Faith, Inc. v. Commissioner*, (1991, CA7) 950 F2d 365, it was held that the Tax Court did not violate free exercise rights of non-profit business run by religious organization which sought tax exempt status where the court applied reasonable guidelines to determine whether operations of business advanced substantial nonexempt purpose and did not inquire into the merits of the particular religious faith. Similarly, in the case at bar, the Courts determined that the primary use of the real property in question did not advance a substantial religious purpose.

The petitioner operates a vegetarian restaurant and health food store in New York City, which is open to the general public and serves more than three hundred meals daily. While the use of vegetarian food is consistent with Seventh Day Adventist principles, that restaurant is not entitled to an exemption and does not have one. If the petitioner were to operate a commercial bowling alley open to the general public, it also would not be tax exempt, even

through exercise and a healthy body are consistent with the beliefs of said religion. The question to be determined is whether the religious aspect is primary or incidental. In making such determination, there are certain factors that the Courts usually find relevant.

In *Independent Church of the Realization of the Work of God, Inc.*, (A.D., 2d Dept.) 81 A.D.2d 579, the Court noted that certain health care services for a fee were advertised and open to nonadherents of plaintiff's religious principles. In *Greater New York Corporation of Seventh Day Adventists v. Town of Dover*, (1968, 2d Dept.) 29 A.D.2d 861, the Appellate Division pointed out that the premises were used primarily as a spiritual retreat, and that it was not open to the general public, but solely to adherents of the faith. In a more recent case, *Mtr. of Yeshivath v. Assessor*, 79 N.Y.2d 244 (1992), the Court of Appeals of New York states as follows (P.248):

> "The religious instruction programs at Woodbourne are provided to members of the Yeshivah only; they are not open to the general public. No fees are paid for the use of the facilities.."

In this case, the trial judge held as follows:

> "Based upon the lack of participation of guests in Adventist religious matters, the absence of doctrinal instruction or study in the Seventh Day Adventist faith, and the focus on health improvement in plaintiff's own brochure distributed to prospective guests who pay a fee for these health-related services, the Court is constrained to find that the use of the property as a reconditioning center is

primarily for health and fitness purposes rather than for religious purposes..."

With respect to the second inquiry, approximately one-half the persons who reside in the dwellings on the property work in the New York City food store and restaurant, and the other half work in the reconditioning center. The trial judge held that:

> "...As to use of residences by staff workers and for workers in the New York City vegetarian restaurant and health food store, such use is primarily residential with respect to this property and not a use incidental to a religious use of the property."

The Trial Court heard the testimony and reviewed the evidence. This evidence and testimony was further reviewed by the Appellate Division. The findings made are fully supported by the record and do not infringe on the petitioner's First Amendment rights.

III. THERE IS NO BASIS FOR PETITIONER'S EQUAL PROTECTION CLAIM.

The other properties used by the petitioner for comparison to the subject property are not in any way comparable. The petitioner refers to camps for underprivileged children run by Catholic Charities of New York, and the camp owned by Boy Scouts of America. These clearly are not religious exemptions as is claimed in the case at bar. The Friars of Atonement property is a religious retreat that was granted an exemption many years ago. It is a retreat for the friars or monks who use the property very quietly and privately. No violation of the exemption has ever

been observed. The Methodist Church property is used for religious retreats as well as for the scout group that it sponsors. They are all members of the church. In addition, Chairman of the Board of Assessors listed a number of properties where exemptions were denied. (A-505). These include S. Columbanus; Putnam Valley Free Library; Putnam Valley Reformed Temple; The True Answer; Smithtown Tabernacle Gospel; and one-half of Camp Madison Felicia. (A-505). The petitioner submitted no proof of unequal treatment between religious organizations.

CONCLUSION

There are no special or important reasons for granting the petition in this case. The factual determinations in this case are fully supported by the record and do not involve Federal questions. The statute of limitations issue is a sufficient and independent State ground which bars further review. The respondents respectfully request that the petition be denied.

Dated: November 12, 1996

Respectfully submitted,

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